Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-475

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITIONERS' REPLY BRIEF IN SUPPORT OF ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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November 28, 1975

La Salle Street Press — Chicago
Printed in U.S.A.

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The respondent's memorandum in opposition ("Resp. Mem.") raises new arguments to which petitioners reply herein.

I. The Fair Market Value Established By Private Sales Considerations Stands Independently Of The Bona Fide Market Theory.

The respondent correctly admits that the Commission arrived at its valuation of petitioners' eastern Iowa lands by relying principally upon the vast abundance of public land available in neighboring areas at the uniform public

price of $1.25 per acre.[1] (Resp. Mem. 3) We agree that the Commission created a hypothetical prospective purchaser who took into account certain factors commencing with this base price (Resp. Mem. 3), but as proven by the Commission's ultimate valuations these factors resulted in deep discounts from the public price for the great preponderance of petitioners' land. Because the Commission's hypothetical purchaser lacks the simple ability to discern that the rich eastern Iowa farm lands far surpassed any on the market, he is permitted to buy the substantial majority of this land at the bargain price of 90¢ an acre while the real world private purchasers paid an average of $1.60 *more* per acre than the Commissioners' creation.[2]

[1] Such a valuation by the Commission clearly violates those previously undisturbed precedents of the Court of Claims that require probative weight to be accorded to private sales "not controlled by the Government's minimum statutory price for public lands . . . ." *Miami Tribe of Oklahoma, et al.* v. *United States,* 146 Ct. Cl. 421, 450-451, 175 F. Supp. 926, 943 (1959); *Osage Nation of Indians* v. *United States,* 119 Ct. Cl. 592, 97 F. Supp. 381, 420 (1951) cert. denied, 342 U.S. 896; *Alcea Band of Tillamooks, et al.* v. *United States,* 115 Ct. Cl. 463, 504, 87 F. Supp. 938, 947 (1950) reversed as to interest, 341 U.S. 48; *Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. 454, 478, 89 F. Supp. 798, 803 (1950) cert denied, 341 U.S. 902; *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 167 Ct. Cl. 710, 714-15, 340 F.2d 368, 370 (1964). The respondent's memorandum totally ignores these governing precedents.

[2] As is stated by the recognized authority Bonbright, *The Valuation of Property,* p. 61 (1st. Ed. 1937),

> "In short, we are convinced that the willing buyer-willing seller incantation is a great bar to clear thinking in the law, and that it has no more place in legal opinions than it has in the literature of economic theory. In the words of Judge Rose, 'The effort is to find out not what a real buyer and a real seller under the conditions actually surrounding them do, but what a purely imaginary buyer will pay a make-believe seller under conditions which do not exist. You are forced to wonder what would have happened if everything had been different from what it was. It is not easy to guess what will take place in Wonderland, as other people than Lewis Carroll's heroine have found out.'"

In an apparent attempt to justify this fundamental error, the respondent quotes (Resp. Mem. 2-3) language from the Commission's 1969 valuation decision which is critical of the bona fide market theory, *one* of several valuation methods employed by petitioners' experts. This valuation approach established that "normal" land market conditions prevailed in an area when approximately 75% of the land had passed from Government to private ownership. When that point was reached in eastern Iowa, the private sale considerations paid for unimproved lands stiffened slightly to more closely approximate their actual fair market value unaffected by the governmentally depressed sale price of surrounding public lands. The importance of this analysis was that *notwithstanding the depressing effect* of the irrelevant Government price of $1.25 per acre, from the very earliest private land sales and throughout the period 1839-49, there were thousands of private transactions involving over one million acres of unimproved eastern Iowa land which the Commission itself found brought an average price of $2.46 per acre. (App. 61) Having made this finding, the Commission proceeded to ignore this best evidence of value of the cession lands.[1]

The 75% analysis employed by petitioners' experts is consistent with established legal doctrines which reject utilization of forced-sale and depressed-market prices in determining property value. In Orgel, *Valuation Under Emi-*

[1] The Commission found that the $1.25 per acre price resulted from a political compromise between those members of Congress who wished to give away public land and those who wanted to sell them to raise revenue. The price was the same for the finest and worst of lands. (App. 57) The Commission adopted this clearly irrelevant standard as its valuation base and ignored the actual private sale considerations paid for the cession lands.

nent Domain, § 22, pp. 99-100 (2d Ed. 1953) the author states:

> "In eminent domain, no less than in other fields of valuation, the use of the 'willing buyer-willing seller' phraseology is clearly designed to guard against the acceptance of forced-sale values as representing 'fair' market values. The 'willing seller' is a person who is 'not compelled to sell.' The value is 'not such a value as might be obtained for the property at a forced sale.' Courts have even excluded testimony of forced-sale prices at which the given property or similar property, had been previously sold." (Citations omitted.)

Consistent with this Court's precedent in *Sinclair Refining,* petitioners' experts arrived at their valuations after making an exhaustive study of over 19,000 sale transactions between the earliest white settlers which proved the value *they* placed on petitioners' lands. It is this white man's value that petitioners are entitled to receive under the Act. The right to such fair market value is not in any way diminished by employment in part of a bona fide market analysis which, consistent with governing precedent, permits an appraiser 140 years after the event to look into established history to the point when a fair or normalized market shows a slight stiffening of land prices.

Indeed, the evidence in this case is so clear and uncontroversial, and is in such abundance and scope, as to amply support the values petitioners claim for the eastern Iowa lands without need for expert opinion or interpretation. As is shown in the following summary of resale prices from petitioners' comprehensive appraisal report (T-4, p. 112, Table 23), a consistent range of average resale prices persisted for unimproved cession lands from the very first private land sales throughout the period 1839-49:

	Year	No. Transactions	Acreage	Value Total	Value Per Acre
"Summary	1839-41	2,442	199,386	$465,643	$2.34
All Tracts	1842-44	2,955	231,220	573,892	2.48
	1845-47	4,352	270,467	725,455	2.60
	1848-49	3,911	249,373	594,388	2.38"

Under governing precedents, the Commission committed fundamental error in wholly rejecting these actual private sale prices paid by settlers for the cession lands, thereby denying petitioners a hearing with respect to this best evidence.

II. No Adequate Valuation Basis Existed At The Cession Dates To Justify A Departure From The Holding In *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co., 289 U.S. 689 (1933).*

The respondent purports to distinguish the facts of the *Sinclair Refining* case from the instant record on the basis that contemporaneous evidence before the Commission provided an adequate basis for a determination of fair market values of the cession lands without reference to petitioners' comprehensive private sales evidence. (Resp. Mem. 4) The respondent points to such non-market-price factors as "the sale price during the 1830's of adjoining *public* land, the location of the tracts, the quality of the soil, the degree of political organization in the area, and the climate . . . ." (Resp. Mem. 4) (Emphasis added.) In *Sinclair Refining* the Court could have equally limited its considerations to such conjectural elements of value known at the time of breach of a patent agreement, but the Court clearly held that a wrongdoer is not entitled to the benefit of such "uncertain prophecies" when years have gone by to "expose to light the elements of value that were there from the beginning." *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. at

689. As one of petitioners' valuation experts[1] aptly testified at trial in accord with *Sinclair Refining*, eastern Iowa should not be valued by closing one's eyes to historical fact:

> "[W]e are living more than a century after these events transpired. Without holding our heads in the sand, we can't close our eyes to what has happened since then. In an appraisal of this type, or an evaluation of this type, it seems to me that we have a unique opportunity to find out what the value actually was. *There is an adage that appraisers use that the value of a thing is the price it will bring, and if you operate after the time period you should change this, the value of a thing is the price it did bring.*" (Tr. 1298) (Emphasis added.)

The argument made by respondent begs the principal issue already decided by *Sinclair Refining* and again placed before the Court in the context of this case arising under the highly remedial Indian Claims Commission Act. *Sinclair Refining* holds that historical evidence may not be ignored by a fact-finding body where such proof provides the best evidence of value of unique property. The unique richness of petitioners' eastern Iowa lands caused them to sell at an unprecedented rate and at private sale prices of twice the Government price. Clearly, the Congressional intent of the Act to fairly and finally resolve outstanding Indian claims cannot be satisfied, and petitioners' lands cannot be properly valued, unless the post-cession sales evidence in this case is accorded substantial probative weight as the best evidence of value in accord with the rule in *Sinclair Refining* and related precedents.

III. Prior Governing Precedents Do Not Support The Commission's Rejection Of Petitioners' Post-Cession Sales Evidence.

As is stated in the Petition for a Writ of Certiorari, the Commission's decision below denying probative weight to

[1] The expert referred to is Dr. Raleigh Barlowe, Professor and Head of the Department of Resource Development at Michigan State University. (Tr. 1094)

comprehensive post-cession sales evidence cannot be supported by this Court's precedents, general valuation precedents or apposite precedents in Indian cases. The respondent alleges (Resp. Mem. 5-6) that the rejection of such evidence is supported by the decisions in *Otoe and Missouria Tribe of Indians* v. *United States,* 131 Ct. Cl. 593, 131 F. Supp. 265 (1955), cert. denied, 350 U.S. 848, reversing 2 Ind. Cl. Comm. 335; *United States* v. *Emigrant New York Indians,* 177 Ct. Cl. 263 (1966); and *Delaware Tribe of Indians* v. *United States,* 8 Ind. Cl. Comm. 150 (1959). However, these cases are obviously inapplicable to the case at bar and in no way detract from the line of unbroken apposite precedents relied upon by petitioners. (p. 2, fn.1 *supra*)

The *Otoe* and *Emigrant New York Indians* cases are not authority for rejecting the petitioners' private post-cession sales evidence because those cases did not involve any evidence whatsoever of private sale considerations within cession lands shortly after cession. Those cases related to methods of valuation to be employed in the absence of such comparable private sales evidence.

Similarly, the respondent's reliance upon the Commission's decision in *Delaware Tribe* v. *United States,* 8 Ind. Cl. Comm. 150 (1959) is misplaced. At issue in *Delaware* was the valuation of a ten mile wide strip of land extending for 150 miles across northeastern Kansas known as the "Delaware Outlet" which was ceded by the petitioners in 1854. The petitioners placed in evidence sales made in certain comparison tracts. (8 Ind. Cl. Comm. at 180) However, the sales in the alleged comparison areas were not relevant because the comparison areas were "vastly different than the elongated 10 mile wide Outlet strip reaching out into country frequented by hostile Indian tribes." (8 Ind. Cl. Comm. at 186) The Commission accordingly held that the land boom occurring in the comparison areas some

two years after the cession of the Outlet could not reasonably be used as a factor to assess the worth of the Outlet land.

As distinguished from the facts in *Delaware,* the case at bar involves an unprecedented rapid rate of land sales *within* the ceded Iowa tracts after they were first opened to public settlement. (T-4, p. 81) Consequently, the *Delaware* case is irrelevant to this case. This land rush into eastern Iowa would have been forecast by any competent observer who considered the readily apparent enormous fertility of the eastern Iowa land as compared to any other lands in the United States.

The cases cited by the respondent do not establish any rule under the Act which rejects post-cession private sales evidence such as that relied upon by petitioners in the 1962 trial of this cause. The Commission may not by fiat create a new rule of law contrary to well-established doctrines enunciated by higher federal tribunals. In light of the precedents of *Sinclair Refining* and the uninterrupted line of *relevant* cases decided by the Court of Claims under the Act requiring that probative weight be given to post-cession private sales (p. 2, fn. 1 *supra*), the Commission committed clearly reversible error in rejecting petitioners' in-depth private sales data. Contrary to the respondent's assertion (Resp. Mem. 5), the decisions appealed from clearly attempt to overrule past precedent on which petitioners' justifiably relied in formulating the basic theory of their case at trial. If this clear departure from past precedent is to be allowed, then petitioners did not wait too long under the Court's *Huson* decision to seek the opportunity to meet this new standard when this case was remanded to the Commission following appeal of the Commission's 1969 valuation decision.

CONCLUSION

For the reasons stated herein and in petitioners' petition for issuance of a writ of certiorari, petitioners respectfully pray that a writ of certiorari issue to review the decisions below.

Respectfully submitted,

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